

(1990) 04 DEL CK 0002

In the Delhi High Court

Case No : Criminal Writ Appeal No. 630 of 1989

Abdul Gafoor

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-04-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)

Citation : (1990) 41 DLT 264

Hon'ble Judges : Y.K. Sabharwal, J

Bench : Single Bench

Advocate : Harjinder Singh, L.K. Bhushan, G. Prakash, Omana George and
T.T.K. Kannan, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) The challenge in this petition is to the order dated 30th January, 1989 by Government of Kerala directing the detention of the petitioner in exercise of powers conferred by Sections 3(1)(i), 3(1)(ii) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "The Act"), with view to preventing him from smuggling goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggling goods. The declaration u/s 9(1) of the Act dated 2nd March 1989 was made by Sh. B.V. Kumar, Additional Secretary to the Government of India. The said declaration is also under challenge in this petition.

(2) On 4th September 1989 a representation was made by the petitioner to Central Government of India. English translation of the said representation which was addressed to the President of India is Annexure G to the writ petition. In that representation the petitioner had also challenged the aforesaid declaration made u/s 9(1) of the Act.

(3) The present petition was filed on 4th October, 1989. One of the grounds

taken in petition is that the representation dated 4th September 1989 has not been dealt with promptitude and expeditiously as the same had not been disposed till the filing of the writ petition. In answer to that ground the respondent-Union of India in the counter affidavit, inter alia, pleaded that on receipt of comments the file was put up to the Joint Secretary to that Government of India who has been empowered to deal with the representation of the detenu and the representation dated 4th September 1989 was considered and rejected on 23rd November 1989. Thus the representation was disposed of after filing of the writ petition. In the rejoinder a plea has been taken by the petitioner that the consideration of the representation by the Joint Secretary is illegal as the declaration u/s 9(1) of the Act has been made by the Additional Secretary and, Therefore, the Joint Secretary who was inferior in rank was not competent in law to consider the said representation. When this matter came up on 16th March 1990 the respondent was granted an opportunity to file a sur rejoinder to meet the aforesaid plea taken in the rejoinder affidavit, The Union of India has not filed any sur rejoinder.

(4) Mr. Harjinder Singh, learned counsel for the petitioner, relying on a Division Bench judgment of this Court in *Vijaya Kumar v. Union of India* 1988 CLJ 1198, contends that the Joint Secretary to Government of India could not deal with and dispose of the petitioner's representation being an officer inferior in rank to that of Additional Secretary to the Government of India. It is apparent the representation of the petitioner was considered and dealt with by the Joint Secretary. Admittedly the Joint Secretary is inferior in rank than the Additional Secretary. In the cited case, the declaration u/s 9(1) of the Act had been made by Sh. M.L. Wadhawan. Additional Secretary to the Government of India. The representation made by the petitioner to the President of India in this case was also dealt with and disposed of by Sh. M.L. Wadhawan acting as the Central Government also being the duly empowered in that behalf. Two contentions were raised :- (1) The representation in law could be considered only by an officer superior to the one who made the declaration; and (2) The same officer who made the declaration, could not legally deal with the representation of the detenu. On behalf of the respondents it was contended that the officer had dual capacity and in both the capacities he was duly empowered to pass the order as an officer of the Central Government. While dealing with the respective contentions the court held, "Thus, it appears to us that in such a case the representation u/s 11(1)(B) must necessarily be dealt with and disposed of by an officers of the Central Government superior to one who made the declaration and being duly empowered in that behalf by the Central Government or in any case by an officer of the same rank duly empowered in that behalf other than the officer who made the declaration". A detenu has a legal right to make an effective representation against a declaration u/s 9(1) of the Act. If the said representation is dealt with and considered by an officer inferior in rank than the one who made declaration u/s 9 of the Act, the right to make a representation would become illusory Learned counsel for the respondents sought to distinguish

the decision in Vijaya Kumar's case on the ground that in that case the representation had been considered by the same officer who made the declaration u/s 9 of the Act and on that account, the Bench held that the declaration was illegal. In my opinion, that is not the only ratio of the judgment. It is clear from the afore quoted passage from Vijaya Kumar's case that either the representation can be dealt with and disposed of by an officer of the same rank duly empowered in that behalf but that officer has to be different than one who made the declaration u/s 9 of the Act, or by an officer superior in rank than the one who made the declaration u/s 9 of the Act. In the present case the detention is liable to be quashed as the representation has been considered and dealt with by an officer inferior in rank than the officer who made the declaration u/s 9 of the Act. The law laid down in the decision of Vijaya Kumar's case is fully applicable to the facts and circumstances of the case. The impugned order of detention or the continued detention of the petitioner stands vitiated on the aforesaid ground.

(5) In view of the success of the petitioner on this ground, it is not necessary to consider other grounds urged in the petition.

(6) For the foregoing reasons the order of detention and the continued detention of the petitioner is quashed. Writ the petition is allowed and rule is made absolute. The petitioner shall be released forthwith, if not required in any other case.